M E M O R A N D U M

To: **Members**
COMMITTEE ON THE JUDICIARY

From: **Lamar Smith**
Chairman

Date: **January 24, 2011**

Subject: **Full Committee Markup of:**
H.R. 394, the "Federal Courts and Venue Clarification Act of 2011";
H.R. 398, To amend the Immigration and Nationality Act to toll, during active-duty service abroad in the Armed Forces, the periods of time to file a petition and appear for an interview to remove the conditional basis for permanent resident status, and for other purposes;
H.R. 386, the "Securing Cockpits Against Laser Pointers Act of 2011";
H.R. 368, the "Removal Clarification Act of 2011"; and
H.R. 347, the "Federal Restricted Buildings and Grounds Improvement Act of 2011"

On **Wednesday, January 26, 2011, at 10:00 am in Room 2141 of the Rayburn House Office Building**, the Committee on the Judiciary will meet to mark up the following: H.R. 394, the "Federal Courts and Venue Clarification Act of 2011"; H.R. 398, To amend the Immigration and Nationality Act to toll, during active-duty service abroad in the Armed Forces, the periods of time to file a petition and appear for an interview to remove the conditional basis for permanent resident status, and for other purposes; H.R. 386, the "Securing Cockpits Against Laser Pointers Act of 2011"; H.R. 368, the "Removal Clarification Act of 2011; and H.R. 347, the "Federal Restricted Buildings and Grounds Improvement Act of 2011".

H.R. 394, THE "FEDERAL COURTS AND VENUE CLARIFICATION ACT OF 2011"

I. BACKGROUND

H.R. 394 incorporates the text of H.R. 4113 from the 110th Congress in addition to four minor changes developed by the Department of Justice and the Senate Judiciary Committee in December 2010.

Title I of H.R. 394 (and its predecessor, 4113) is based on another bill, H.R. 5440, authored by Judiciary Committee Chairman Lamar Smith in the 109th Congress. The Courts and Intellectual Property Subcommittee marked-up H.R. 5440 on May 24, 2006, but the legislation was never considered by the full Committee. In addition,, H.R. 394 as introduced includes a Title II that addresses federal venue and transfer.

The House passed H.R. 4113 on September 28, 2010, by voice vote under suspension of the Rules. The Senate adjourned before it could take up an amended version of the bill that now comprises the text of H.R. 394.

II. PURPOSE

The "Federal Courts and Venue Clarification Act" brings more clarity to the operation of jurisdictional statutes and facilitates the identification of the appropriate state or federal court where actions should be brought. Judges believe the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation. The contents are based on recommendations developed and approved by the United States Judicial Conference.

III. LEGISLATIVE HISTORY

Given the press of other agenda items in 2010, the Judiciary Committee could not devote "formal" process to the evaluation of H.R. 4113 during the 111th Congress. In other words, while the bill was considered important, the Committee did not have time to conduct a hearing on H.R. 4113, followed by a markup. Instead, the Administrative Office of the US Courts ("AO") functioned as a clearinghouse to vet the bill and newly-developed revisions to it with the Judicial Conference's Federal-State Jurisdiction Committee, academics, and interested stakeholders. The main stakeholder groups include the American Bar Association ("ABA"), Lawyers for Civil Justice ("LCJ"), the Federal Bar Association ("FBA"), the American Association for Justice ("AAJ," or trial lawyers), and the Chamber of Commerce.

Legal scholars from the University of Houston, Chicago-Kent, Loyola, and Duke law schools endorse suggested changes to the original text of H.R. 4113, which was developed by Professor Arthur Hellman of the University of Pittsburgh School of Law, who testified at the 2005 Subcommittee hearing and contributed to the project in the 111th Congress. (Two of these scholars are the authors of removal chapters in, respectively, *Moore's Federal Practice* and *Wright and Miller's Federal Practice and Procedure*—the leading treatises on federal civil procedure and practice.) Professor Hellman's recommendations are confined to the removal provisions of Title I. In addition, the AO received feedback from the ABA and AAJ on the amount in controversy, declarations regarding relief, removal, and transfer. LCJ and FBA comments reflect general support for the bill.

The point of this exercise was to identify and delete those provisions that were considered controversial by prominent legal experts and advocacy groups. This informal vetting process served the functional equivalent of a hearing or markup and increased the likelihood that H.R. 4113 could be passed last year by both houses of Congress prior to adjournment *sine die*.

As noted, the House passed the bill by voice vote under suspension of the Rules on September 28, 2010. The Senate Judiciary Committee insisted on minor amendments that were agreed to by the House principals. These amendments include the following:

- Maintaining the status quo treatment of derivative jurisdiction. H.R. 4113 as passed by the House made technical changes to §1441(f) to clarify that the derivative jurisdiction doctrine has no application to other sections within title 28. Prior to 1986, the derivative jurisdiction doctrine meant that if a state court lacked jurisdiction over an exclusively federal matter, removal to federal court under §1441(f) was nonetheless barred because the US district court's jurisdiction was not "derivative" of the jurisdiction that attached in state court. Justice Department attorneys said that although it is infrequently used, the doctrine of derivative jurisdiction is indeed sometimes invoked by them when suits involving federal officers and agencies are removed to federal court. They gave as a particular example the situation when a defendant seeking to escape a state court forum brings a third-party action against a federal employee. If the federal employee was acting within the scope of the employee's employment, the U.S. can remove the case to federal court under 28 USC §1442 & §2679. The federal court then applies the derivative jurisdiction doctrine and dismisses the third-party claim against the federal employee, remanding the underlying action to state court. DOJ says that in such instances the third-party claim against a federal employee is often brought merely to obtain a federal forum, thereby frustrating the plaintiff's choice of forum.

- A clarification that a district court, and not state court, can make findings regarding the appropriateness of certain removals. This is a non-substantive change.

- Substitution of the generic word "entity" for "party" in one instance, consistent with the context of its usage.

- Deletion of an extra comma in one provision.

As noted, the Senate adjourned *sine die* before acting on an amended version of H.R. 4113 that incorporated these amendments.

H.R. 394 includes the base text as approved by the House in the 111th Congress along with the Senate changes.

IV. SECTION-BY-SECTION

Section 1. Short title; table of contents.

TITLE I – JURISDICTIONAL IMPROVEMENTS

Section 101. Treatment of resident aliens.

Pursuant to 28 USC §1332, US district court jurisdiction is based on the amount in controversy (more than $75,000) and diversity of citizenship. Diversity jurisdiction is available only if no plaintiff and defendant are from the same state.

Diversity principles also apply to litigants who are aliens, or foreign-born persons who have not qualified for US citizenship. Diversity jurisdiction in these cases is satisfied if the dispute is between citizens of a state and citizens or subject of a foreign state (§1332(a)(2)); or citizens of different states and in which citizens or subjects of a foreign state are additional parties (§1332(a)(3)). To offer guidance in interpreting subsection (a), Congress added the so-called "resident alien proviso" to the statute in 1988. It reads: "an alien admitted to the United States for permanent residence [i.e., an alien who holds a green card] shall be deemed a citizen of the state in which such alien is domiciled."

However, the "deeming" text has created unintended consequences that are at odds with the longstanding doctrine that alienage jurisdiction exceeds the scope of Article III unless a US citizen appears as a party. For example, the deeming text could permit two resident aliens from different states each to claim citizenship of their respective state of domicile – and therefore claim access to federal diversity jurisdiction.

Section 101 corrects this problem by deleting the alien provision text (thereby ensuring that resident aliens cannot be treated as US citizens for purposes of jurisdiction) with language clarifying that diversity jurisdiction does not exist in suits between a citizen of a state and a permanent resident alien within that state. This revision is consistent with the history of §1332 (with the exception of the alien proviso language). It prevents expansion of diversity jurisdiction, resulting in a modest reduction of cases adjudicated in federal courts.

Section 102. Citizenship of corporations and insurance companies with foreign contacts.

Pursuant to 28 USC §1332(c), a corporation is deemed a citizen of any state in which it has been incorporated and of the state where it has its principal place of business. The purpose of the subsection is to preclude diversity jurisdiction over a dispute between an in-state citizen and a corporation incorporated or primarily doing business in the same state. Under this scenario neither party is presumed to face a threat of local bias in a state court.

Courts have struggled to apply §1332(c) in actions involving a US corporation with foreign contacts or foreign corporations that operate in the United States. The main problem is that the

subsection does not specify whether the term "state" includes contact with a foreign state (country of incorporation or principal place of doing business). Some courts believe the word refers to the 50 domestic states, while others believe it includes foreign states as well.

Section 102(a) resolves this division of authority in favor of curtailing diversity. In so doing, the change treats foreign corporations on a basis consistent with domestic corporations for purposes of diversity jurisdiction. The text clarifies that all corporations, foreign and domestic, are regarded as citizens of both their place of incorporation and their principal place of business. This should result in a denial of diversity in two situations: (1) where a foreign corporation with its principal place of business in a state sues or is sued by a citizen of that same state; and (2) where a citizen of a foreign country (an alien) sues a US corporation with its principal place of business abroad. State courts of general jurisdiction would still be available to the parties in both scenarios.

Section 1132(c) as written also provides that an insurer is deemed a citizen of the state in which the insured is a citizen, as well as any state of which the insured is incorporated and the state where it has its principal place of business. The extra "deeming" feature that equates an insurer's state citizenship with that of the insured was developed in 1964 in response to a surge of diversity case filings against insurers in Louisiana federal courts. At the time, plaintiffs' lawyers determined that they would probably receive larger jury verdicts in a federal forum. Since a Louisiana state statute allowed plaintiffs to sue the insurer directly without joining the insured, routine automobile cases that were more properly handled in state court found their way to US district court. At least five other states have similar direct-action statutes or other laws that permit this tactic.

Section 102(b) therefore provides the same definition of citizenship for an insurer engaged in direct action litigation as that proposed in §102(a) for corporations with foreign contacts.

Section 103. Removal and remand provisions.

Section 103 prescribes changes to the federal removal and remand procedures, especially those set forth in 28 USC §1441 (general venue) and §1446 (venue procedures).

Current law authorizes a defendant to remove the entire case whenever a "separate and independent" federal question claim is joined with one or more non-removable claims. Following removal, the US district court may either retain the whole case or remand all matters in which state law predominates. This has compelled some courts to question the constitutionality of how the statutes operate, since §1441 purports to authorize federal courts to decide state law claims for which the federal courts do not have jurisdiction. New section §1441(c) therefore permits removal of the case but requires that a district court remand any unrelated state law matters.

Section 103 also separates the removal provisions relating to civil and criminal proceedings into two statutes. This will assist litigants in knowing which provisions are applicable to their cases.

In addition, Section 103 addresses removal in multiple-defendant cases and the propriety of removal after one year. Each issue addresses timing.

In multiple-defendant scenarios, current law allows the first-served defendant to remove within 30 days; but courts are split as to when the clock is triggered for a later-served defendant. Section 103 resolves the dilemma by allowing a later-served defendant to remove within 30 days of receipt of a summons or the initial pleading; an earlier-served defendant could also consent to removal at this time, provided he did not previously initiate or consent to removal. This approach follows the trend in recent cases.

Section 103 also permits removal after one year from the commencement of the action, but under limited circumstances. The current one-year bar was intended to encourage prompt determination of issues in removal proceedings; however, it has led some plaintiffs to adopt removal-defeating strategies to retain cases in state court. The change allows removal after one year, but only if the plaintiff has "acted in bad faith in order to prevent a defendant from removing the action."

The amount in controversy is important to the removal of any federal-diversity case because the underlying dispute must exceed $75,000. Problems arise when state practice either does not require or permit the plaintiff to assert a sum claimed or allows the plaintiff to recover more than the amount asserted. This has caused a split among the federal circuits, which have struggled to adopt the appropriate standard for determining that the amount in controversy requirement is satisfied.

Section 103 deems the sum demanded in the initial pleading to be the amount in controversy. If the pleading seeks non-monetary damages or a money judgment that is not specified or otherwise falls below the federal threshold, the defendant is permitted to assert the amount in the notice of removal. The court must grant the removal if it finds by a preponderance of the evidence that the amount in controversy exceeds $75,000.

Section 104. Effective date.

Subsection (a) stipulates that, subject to subsection (b), the changes in title I shall take effect upon the expiration of the 30-day period beginning on the date of enactment of H.R. ___ and shall apply to any action or prosecution commenced on or after the effective date.

Subsection (b) states that an action or prosecution commenced in state court and removed to federal court shall be deemed to commence on the date the action or prosecution was commenced in state court.

TITLE II – VENUE AND TRANSFER IMPROVEMENTS

Section 201. Scope and definitions.

Section 201 creates a new §1390 to Chapter 87 of the US Code to define "venue" and to specify two areas where the venue chapter would be inapplicable.

Proposed §1390(a) provides a general definition that distinguishes venue (a geographic specification of the appropriate forum for litigation) from other provisions of federal law that operate as restrictions on subject-matter jurisdiction. These restrictions differ from venue rules in that they may not be waived by the parties and will not be affected by changes in Chapter 87's general venue rules. The general rules also leave intact a variety of special provisions in various statutes that identify the proper forum for litigation under specific acts of Congress.

Section 1390(b) clarifies that the general venue provisions do not apply to proceedings in admiralty. This tracks the theme of Rule 82 of the Federal Rules of Civil Procedure, which states that admiralty or maritime claims shall not be treated as civil actions for purposes of federal venue. Section 1390(b) also codifies case law to ensure that admiralty disputes are subject to the general transfer provisions of 28 USC §§1404-1407.

Finally, §1390(c) provides that the venue statutes do not determine the proper venue for a case removed from state court to a US district court. Consistent with case law, the removal statute, 28 USC §1441(a), makes venue proper in the federal district court for the district in which the state action was pending. Section 1390(c) also codifies current practice by stipulating that Chapter 87's transfer provisions govern the transfer of a removed action between federal district courts once a case has been removed.

Section 202. Venue generally.

Section 202 replaces the first four subsections of the general venue statute, 28 USC §1391.

New §1391(a)(1) follows current law in providing the general requirements for venue choices, but would not displace the special venue rules that govern under the more than 200 venue statutes codified outside of title 28.

New §1391(a)(2) ends the use of the "local action" rule, which provides that certain real property actions may be brought only in the district in which the property is located. The rule is problematic because a US district court may not be able to exercise personal jurisdiction over a defendant accused of trespass in the place where the property is located. The unanimous modern view is that the rule no longer serves a purpose.

Current law creates identical venue requirements for federal actions based on diversity and federal question jurisdiction. There is a separate provision in each venue section governing "fallback" provisions that primarily apply to overseas claims. Many academics and the American

Law Institute believe there should be no venue distinction between diversity and federal question actions. Section 202 responds to this concern by establishing a single, unitary approach to venue rules. This includes eliminating the fallback provisions of the current statute.

New §1391(c) prescribes residency rules for purposes of determining venue. Under current law, venue in a suit against a natural person may lie in a district where the defendant "resides," which most courts (but not all) interpret as a reference to the party's domicile. The draft resolves this division of authority by adopting the majority rule.

New §1392(c)(2) addresses a division of authority as to the venue treatment of unincorporated associations, such as unions and partnerships. The provision embraces Supreme Court case law on the subject by establishing parity among entities that operate under a "common name." It deems unincorporated associations, corporations, and any other party that has the right to sue and be sued in common name, if a defendant, to be a resident in any judicial district in which the defendant is subject to the court's personal jurisdiction; and if a plaintiff, only in the judicial district in which it maintains its principal place of business. This change is consistent with the ALI's recommendation that venue for common-name entities should be based more on the convenience of defendants.

New §1393(c)(3) clarifies venue rules for aliens. To begin with, current law allows aliens to be sued in any district, thereby denying them the ability to raise venue as a defense to the location of litigation. This means the presence of an alien is disregarded in the application of the venue statutes to any co-defendants who are not aliens, a feature that is preserved in the statutory rewrite.

But §1393(c)(3) changes the focus from the alienage of a defendant to whether the defendant has his residence outside of the United States. In other words, the protection of a defendant from being sued in an inappropriate forum is dependent upon whether the defendant is subject to personal jurisdiction of a US district court and to potential transfer under a separate statute. This means that aliens and US citizens domiciled abroad could not claim a venue defense to the location of litigation. Both parties could, however, continue to object to personal jurisdiction in federal court.

Finally, new §1393(c)(3) allows permanent resident aliens – persons who have been granted authorization to live and work in the United States on a permanent basis – to raise a venue defense. This change is advocated by the ALI, which notes that "it makes little sense to assimilate permanent resident aliens domiciled in a state to US citizens domiciled in a state for subject-matter jurisdiction but not for purposes of venue."

Section 203. Repeal of section 1392.

28 USC §1392 provides that "[a]ny civil action, of a local nature, involving property located in different districts in the same state, may be brought in any of such districts." Because Section 202 (proposed §1392(a)(2)) abolishes the local-action rule, Section 203 repeals §1392.

Section 204. Change of venue.

Section 1404(a) of title 28 authorizes the transfer of civil actions for the convenience of the parties and witnesses and in the interest of justice, but it limits the transfer of an action to those districts "where [the action] might have been brought." The Supreme Court has interpreted this to require that the transferee district be one in which both venue and personal jurisdiction are proper. This interpretation, however, narrows the range of possible transferee districts and precludes a transfer of the case to a district where it might be more convenient to the litigants.

Section 204 responds to this problem by permitting a federal court to exercise broader discretion in transferring cases "to any district or division to which all parties have consented." This change also incorporates technical amendments to ensure that the provision does apply to transfers from an Article III district court to any of the non-Article III territorial courts located in Guam, the Northern Mariana Islands, and the Virgin Islands. Such a transfer would be unconstitutional.

Section 205. Effective date.

The changes in title II shall take effect upon the expiration of the 30-day period beginning on the date of the enactment of H.R. 4113. The changes will apply to (1) any action commenced in a US district court on or after the effective date and (2) any action that is removed from a state court to a US district court that had been commenced (within the meaning of state law) on or after the effective date.

H.R. 398, TO AMEND THE IMMIGRATION AND NATIONALITY ACT TO TOLL, DURING ACTIVE-DUTY SERVICE ABROAD IN THE ARMED FORCES, THE PERIODS OF TIME TO FILE A PETITION AND APPEAR FOR AN INTERVIEW TO REMOVE THE CONDITIONAL BASIS FOR PERMANENT RESIDENT STATUS, AND FOR OTHER PURPOSES

I. BACKGROUND

A U.S. citizen can sponsor an alien spouse for permanent residence with no numerical limitation. A permanent resident can sponsor an alien spouse for permanent residence, but a yearly quota exists. In both cases, the alien spouse becomes a conditional permanent resident.[1]

After two years, the alien spouse and the U.S. citizen or permanent resident spouse must jointly file a petition with the Department of Homeland Security for the removal of the conditional status.[2] If the petition is successful, the alien spouse becomes a full permanent resident. The petition must be filed during the 90-day period before the second anniversary of the spouse's becoming a conditional permanent resident, unless the alien establishes to the satisfaction of DHS good cause and extenuating circumstances for failure to file on time.[3] Upon

[1] See section 216(a)(1) of the Immigration and Nationality Act.
[2] See section 216(c) of the INA.
[3] See section 216(d)(2) of the INA.

the filing of the petition, DHS will interview the spouses to ascertain whether there was any possible marriage fraud.[4] The interview must be conducted within 90 days of the submission of the petition, unless DHS waives the deadline for the interview or the requirement for the interview.[5]

What happens in circumstances in which the U.S. citizen or permanent resident spouse is serving oversees in active duty status with the Armed Forces? It clearly might be a disruption to the military to have to facilitate a member of the Armed Forces deployed overseas filing a petition and traveling for a personal interview with DHS. While DHS can choose to delay this process in appropriate circumstances, a blanket tolling of the time periods while a spouse is serving abroad in the U.S. Armed Forces may be appropriate.

H.R. 398 tolls the two time periods during any period of time in which a spouse is a member of the Armed Forces of the United States and serving abroad in active-duty status. The spouses do retain the right to be able to file a petition within the normal time period and DHS retains the right to waive the interview requirement in appropriate circumstances.

II. SECTION-BY-SECTION

Subsection (a) of section 1 of the bill modifies section 216 of the Immigration and Nationality Act to provide that the 90 day period for filing a petition to remove the conditional permanent resident status of an alien spouse of a U.S. citizen or permanent resident shall be tolled during any period of time in which the alien spouse or petitioning spouse is a member of the Armed Forces of the United States and serving abroad in an active duty status in the Armed Forces, except that, at the option of the petitioners, the petition may be filed during such active-duty service at any time after the commencement of such period.

Subsection (a) also provides that the 90 day period for the personal interview shall be tolled during any period of time in which the alien spouse or petitioning spouse is a member of the Armed Forces of the United States and serving abroad in an active-duty status in the Armed Forces, except that this shall not be construed as to prohibit the Secretary of Homeland Security from waiving the requirement for an interview pursuant to the Secretary's authority.

Subsection (b) of section 1 contains conforming amendments.

Section 2 of the bill provides that the budgetary effects of the bill, for the purpose of complying with the Statutory Pay-As-You-Go Act of 2010, shall be determined by reference to the latest statement titled ''Budgetary Effects of PAYGO Legislation'' for the bill, submitted for printing in the Congressional Record by the Chairman of the Committee on the Budget of the House of Representatives, provided that such statement has been submitted prior to the vote on passage.

[4] See section 216(b) of the INA.
[5] See section 216(d)(3) of the INA.

H.R. 386, THE SECURING COCKPITS AGAINST LASER POINTERS ACT OF 2011"

I. BACKGROUND

This bill addresses the high number of incidents involving lasers being pointed at air craft while in flight. Many of these incidents are occurring during the take off and landing portion of a flight, when the pilots need to be most alert. The FAA has reported that pilots have had to relinquish control of their aircraft to their copilot. In the case of law enforcement aircraft, there are reports that responses to crime scenes by airborne police units were terminated due to laser interference. Over 2,800 laser incidents were reported in 2010.

Some perpetrators have been charged under 18 U.S.C. § 32, relating to the destruction of aircraft. However, this provision requires the government to prove willful interference and intent to endanger the actual pilots. While this burden may be more easily established when a person attempts to detonate a bomb onboard an aircraft or attempts to overtake a member of the flight crew, it is difficult to establish this same type of intent for a laser incident, even if the effect is to endanger the actual pilots.

This bill recognizes the obvious and inherent danger of aiming a laser at an aircraft under any circumstance, as long as you knowingly aim the laser at the aircraft. The penalty under section 32, 20 years, coupled with having to prove specific intent to interfere with, disable, or endanger the pilots, seems to be a factor in a declination of prosecution under the current statute.

The problem of lasers being shone into cockpits is so prevalent in some areas that the FBI, FAA, Federal Air Marshal Service, as well as State and local law enforcement, have established a Laser Strike Working Group to address the problem.

When the bill was introduced last year, the Air Line Pilots Association sent a letter of support that stated in part: ``The inappropriate use of widely available lasers against airborne flight crews is a genuine and growing safety and security concern. A laser illumination event can, at a minimum, be an unwanted flight crew distraction; and in serious cases can even lead to eye damage and temporary incapacitation."

II. LEGISLATIVE HISTORY

This bill was introduced by Mr. Lungren on January 20, 2011. Mr. Lungren also introduced this bill in the 111th Congress (H.R.5810). It passed the House by voice vote on July 27, 2010 and was referred to the Senate. An identical bill was introduced in the 110th Congress (H.R. 1615) by Mr. Keller with a hearing held on May 1, 2007, and a mark-up session on May 2, 2007. The bill passed the House by a voice vote on May 22, 2007, and was referred to the Senate.

III. SECTION-BY-SECTION

Sec. 1. Short title.

Section 1 sets forth the short title of the bill as `Securing Aircraft Cockpits Against Lasers Act of 2011.'

Sec. 2. Prohibition against Aiming A Laser Pointer At An Aircraft.

Section 2 makes it a crime to knowingly aim the beam of a laser pointer at an aircraft in the special aircraft jurisdiction of the United States or at the flight path of such aircraft. An individual convicted of this crime is subject to criminal fines or imprisonment up to 5 years. This provision does not apply to: (1) individuals conducting research and development or flight test operations for an aircraft manufacturer or the Federal Aviation Administration; (2) Department of Defense or Department of Homeland Security personnel conducting research, development, operations, testing or training; or (3) an individual using a laser emergency signaling device to send a distress signal.
Section 2 authorizes the Attorney General, in consultation with the Secretary of Transportation, to provide by regulation, after public notice and comment, additional exceptions to this provision as necessary and appropriate. The Attorney General must give written notice of any such proposed regulations to the House and Senate Committees on the Judiciary as well as other specified committees.

Sec.3. Compliance with PAYGO.

Sets the determination of the budgetary effects of the Act for compliance with the Statutory Pay-As-You-Go Act of 2010.

H.R. 368, THE "REMOVAL CLARIFICATION ACT OF 2011"

I. BACKGROUND

The Judiciary Committee's Subcommittee on Courts and Competition Policy conducted a hearing on H.R. 5281 (the predecessor bill to H.R. 368) on May 25, 2010. The witness roster was comprised of two law professors, a representative of the US Department of Justice, and the House General Counsel. All agreed with the purpose of H.R. 5281, while the law professors provided suggestions for amendatory language.

The Subcommittee discharged H.R. 5281 on July 21, 2010, and six days later the full House passed the measure by voice vote under suspension of the Rules. A later attempt by the House and Senate to amend the bill with an unrelated immigration issue (the "DREAM Act") scuttled further consideration of H.R. 5281. Representative Johnson introduced a new version of the bill on December 21 that incorporated clarifying amendments proffered by the Senate Judiciary Committee. The House passed the new bill, H.R. 6560, on December 22 by unanimous consent.

The Senate adjourned shortly thereafter and did not act on the legislation. The text of H.R. 368 is identical to that of H.R. 6560.

II. TITLE 28

Section 1442 of title 28 authorizes removal of civil actions or criminal cases brought in state courts against the following entities:

- The US government, a US agency, or a federal officer sued for any act under color of their office or pursuant to a right derived from Congress to apprehend or punish criminals or to collect revenue;

- a property holder whose title derives from a federal officer, where a civil cause of action or criminal prosecution affects the validity of a federal law;

- federal judicial officers acting under color of office or in the performance of their duties; and

- Members or Senators acting in the discharge of their official duties.

III. PURPOSE OF STATUTE

Testimony provided at the Subcommittee hearing on the subject reveals that the origins of §1442 may be traced back to 1815. The modern-day statute was written in the 1940s.

The purpose of the law is to take from state courts the indefeasible power to hold a federal officer or agent criminally or civilly liable for an act allegedly performed in the execution of their federal duties. This doesn't mean federal officers can break the law; it just means that these cases are transferred to US district court for consideration. Congress wrote the statute because it deems the right to remove under these conditions essential to the integrity and preeminence of the federal government within its realm of authority. Federal officers or agents, including congressmen, shouldn't be forced to answer for conduct asserted within their federal duties in a state forum that invites "local interests or prejudice" to color outcomes. In the absence of this constitutional protection, federal officers, including congressmen, would be subject to political harassment and federal operations generally would be needlessly hampered.

The statute and supporting case law require federal officers to assert a federal defense, such as absolute or qualified immunity, as part of a successful motion to remove. Federal officers must also show that the state suits are based on acts undertaken pursuant to color of office; in other words, they must demonstrate a causal connection between the charged conduct and asserted official authority. Removal is allowed only when the acts of federal defendants are essentially ordered or demanded by federal authority, which also gives rise to federal defenses required by the statute.

IV. *PRICE V. JOHNSON*

House Rule II(8) authorizes the Office of the General Counsel, which provides legal assistance and representation to the House of Representatives and its Members. One of their attorneys flagged a recently-decided case involving a Texas state legal action taken against a Member of Congress (US Rep. Eddie Bernice Johnson) in which removal to federal court was denied by a US District Court and the Fifth Circuit.

On February 17, 2009, in state district court for Dallas County, a third party filed a motion to depose Representative Johnson pursuant to Texas Rule 202. Under Rule 202, a plaintiff may request a *pre-suit* deposition to "perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or … to investigate a potential claim or suit."

In response to this action, Representative Johnson removed the case to federal court pursuant to 28 USC §1442 and moved to dismiss the Price petition on four substantive grounds, including immunity under the Federal Tort Claims Act.

On April 7, 2009, while the motion to dismiss was still pending and without responding to it, Price moved to remand the case to state court under 28 USC §1447. The next day the federal court granted the remand motion even though Representative Johnson had not filed her opposition. A motion to stay the remand order was rejected, and the case was appealed to the US Court of Appeals for the Fifth Circuit.

The Fifth Circuit dismissed the appeal and sided with the District Court, ruling that a Texas Rule 202 proceeding is not a "civil cause of action" under 28 USC §1442 because "it asserts no claim upon which relief can be granted and instead seeks an order for a deposition that may or may not result in the filing of an actual suit." And because the District Court lacked subject matter jurisdiction in the case (i.e., over a "civil action" or a "cause of action"), the Fifth Circuit reasoned they could not assert jurisdiction to review the corresponding remand order.

Representative Johnson has since appealed the case back to the Fifth Circuit under color of a *mandamus* petition.

The House General Counsel's Office and the other witnesses note that federal courts have applied §1442 inconsistently in recent years; *Price v. Johnson* is just the most recent high-profile case that illustrates the problem. In fact, at the Subcommittee hearing on the subject, the General Counsel emphasized that case law interpreting the removal statute is not just split among the circuits but *within* them as well.

To summarize, the problem occurs when a plaintiff who contemplates suit against a federal officer petitions for discovery without actually filing suit in state court. An increasing number of federal courts maintain this conduct just anticipates a suit; it isn't a "cause of action" as contemplated by the federal removal statute, 28 USC §1442.

The problem is compounded because the separate federal remand statute, 28 USC §1447, requires US district courts to remand any case back to state court if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction." Remand orders under §1447 are reviewable if the suit involves civil rights – it has no application to suits involving congressmen and §1442. This means remanded cases brought against congressmen under these conditions cannot find their way back to federal court.

Given that 47 states have enacted pre-civil suit discovery statutes, the General Counsel's Office recommends that the relevant portions of §§1442 and 1447 be amended to take into account the operation of these state pre-civil suit discovery statutes.

V. SECTION-BY-SECTION

Section 2(a) of H.R. 368 amends §1442 by specifying that "civil action" and "criminal prosecution" include "any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued." The bill clarifies that a civil action "commenced" in state court includes those brought "against" a federal officer (which covers suits) as well as those "directed to" a federal officer (which presumably covers discovery proceedings). Finally, Section 2(a) stipulates that if a case combines state subject matter with an ancillary federal issue, only the federal portion will be removable.

Section 2(b) rewrites §1442 by permitting removal by federal officers "in an official or individual capacity, for ***or relating to*** any act under color" of their office. This is intended to broaden the universe of acts that enable congressmen to remove to federal court.

In addition, a reference to federal officers who are "sued" under the statute is also struck in the same subsection to deemphasize the current need for a suit to be brought in advance of a motion to remove.

Section 2 (c) preserves the institutional practice of how the Department of Justice (DoJ) responds to subpoenas. 28 USC §1446 prescribes the procedures for federal removal. Under the statute, the defendant in a civil action must request removal within 30 days following receipt of the complaint. In a criminal case, the request must come within 30 days of arraignment or at any time before trial, whichever is earlier. DoJ helped the Committee to draft Section 2(c) because it wants to maintain the ability to "retrigger" the 30-day period for removal cases that involve enforcement of subpoena requests. The great majority of requests only <u>seek</u> testimony or documents; these are typically frivolous, and are ignored. But DoJ cannot ignore a motion to <u>enforce</u> such a request. Section 2(c) therefore maintains the current and longstanding DoJ practice of resetting the 30-day removal clock for cases that involve the enforcement of a subpoena.

Section 2(d) amends §1447 by permitting judicial review of §1442 cases that are remanded, just as they are with civil rights cases.

Section 3 includes a PAYGO reference to a statement submitted by the House Budget Committee Chairman in 2010. The statement was included in the July 27, 2010, *Congressional Record*, which indicates the bill "would have no significant effect on direct spending by the federal court system."

H.R. 347, THE "FEDERAL RESTRICTED BUILDINGS AND GROUNDS IMPROVEMENT ACT OF 2011"

I. BACKGROUND

The United States Secret Service provides protective services to the President, the first family, the Vice President, former presidents, visiting heads of state, and others. This protection extends not only to the White House and its grounds but also to anywhere a protectee may be temporarily visiting. The Service also provides protection at any event designated as "a special event of national significance."

Current law prohibits unlawful entry into any restricted building or ground where the President, Vice President, or other protectee is temporarily visiting. However, there is no federal law that expressly prohibits unlawful entry to the White House and its grounds or the Vice President's residence and its grounds.

The Secret Service must therefore rely upon a provision in the District of Columbia Code, which addresses only minor misdemeanor infractions, when someone attempts to or successfully climbs the White House fence or, worse, breaches the White House itself.

H.R. 347 remedies this problem by specifically including the White House, the Vice President's residence and their respective grounds in the definition of restricted buildings and grounds.

The bill also clarifies that the penalties in section 1752 of title 18 apply to those who knowingly enter or remain in any restricted building or grounds *without lawful authority to do so*. Current law does not include this important element.

Intentionally disrupting government business or official functions in or near such restricted areas is also forbidden, as is committing an act of violence against a person or property in any such restricted building or grounds.

II. LEGISLATIVE HISTORY

This bill was introduced by Mr. Rooney on January 19, 2011. Mr. Rooney sponsored similar legislation in the 111th Congress (H.R. 2780). It passed the House by voice vote on July 27, 2010.

III. SECTION-BY-SECTION

Section 1. Short Title.

This section cites the short title of the bill as the "Federal Restricted Buildings and Grounds Improvement Act of 2010."

Section 2. Restricted Buildings or Grounds.

This section amends the federal criminal code to revise the prohibition against entering restricted federal buildings or grounds to impose criminal penalties on anyone who knowingly enters any restricted building or grounds without lawful authority. Defines "restricted buildings or grounds" as a posted, cordoned off, or otherwise restricted area of a building or grounds: (1) where the President or other person protected by the Secret Service is or will be temporarily visiting; or (2) so restricted due to an special event of national significance.

Section 3. Paygo Compliance.

This section provides for compliance of the budgetary effects of this Act with the Statutory Pay-As-You-Go Act of 2010.